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Testifying: The Nuts and Bolts of Being a Witness

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A. What Is Testifying?

Testifying is answering questions truthfully under oath about facts within your personal knowledge or about your professional opinions if you have been qualified as a skilled witness or an expert witness. Testimony is usually given in a courtroom, but in some circumstances, testimony may be given at a deposition. Testimony may include offering your written report or records to be considered by the judge as evidence in making his or her decision in a civil or criminal case.

B. When Would You Testify?

In a CHINS case, you would most likely be testifying at the CHINS factfinding hearing or at the Termination of the Parent-Child Relationship Hearing. For CHINS dispositional and case review hearings, Indiana Code 31-34-19-2 allows reports which contain hearsay evidence of probative value to be considered by the judge; consequently, there is less need for formal testimony at most CHINS dispositional and review hearings. At the CHINS factfinding hearing, the judge will be listening to testimony from witnesses and may be reviewing records to decide whether the child meets the definition of a CHINS and whether the child needs care or treatment that will be provided only if the court

intervenes in the child's situation. At a Termination of the Parent-Child Relationship hearing, you may be testifying about your observations of the child, the parents, and the children's care givers, including interactions, behavior, personal appearance, parents' statements made to you, parents' cooperation with services you are providing, and your observations of parents' and caregivers' homes. At either a CHINS or Termination hearing, you could be qualified as a skilled or expert witness and asked to give your opinion on issues such as whether the parents' problems are likely to be remedied.

A skilled witness is a person who has acquired expertise in matters of specialized knowledge by personal experience, and who can draw rational conclusions and give helpful opinions to the judge. An expert witness may be qualified by knowledge, skill, experience, training, or education and may give an opinion and/or answer a hypothetical question. If you think you might be testifying as a skilled or expert witness, bring your curriculum vita to court. Although Indiana Code 25-23.6-4-6 bars licensed social workers, addiction counselors, or clinical addiction counselors from giving expert testimony, the Indiana court of Appeals in B.H. v. Indiana Dept. of Child Services, 989 N.E.2d 355 (Ind. Ct. App. 2013), held that the judge did not abuse his discretion in qualifying a social worker as an expert witness under the Indiana Evidence Rules.
You also might be asked to testify at a civil family law case, such as a dissolution (divorce) case, a paternity custody or parenting time (visitation) case, a guardianship case, or an adoption case about facts within your personal knowledge or as a skilled or expert witness if qualified. Often testimony in family law cases will focus on social services you are providing and will include your records. You could be asked to give an opinion about the child's best interests in a custody or parenting time case.

C. At What Types of Hearings Might You Testify?

Trials before a jury in Indiana will most likely be about a criminal charge, where you might be testifying about results of your forensic interview, your personal observations of a child's injuries, a neglectful home, or parents' statements to you. You could be asked to testify at a criminal jury trial by the prosecutors or by the defense attorney.

Family law, CHINS, and Termination cases in Indiana are always tried before the judge alone. This is called a bench trial. If the criminal defendant so chooses, a criminal case could also be tried by the judge alone at a bench trial.

D. What Is A Subpoena?

A subpoena is a written order to appear at court and testify on a given date and time. Technically, a subpoena should be served on the witness by the civil sheriff or certified mail. In practice, many subpoenas are sent by email or fax to an attorney who is known to be representing a witness. An example of this process is a subpoena sent to the DCS attorney for a DCS case manager.

A subpoena should be read carefully. It should include:

- the name of the witness requested to appear;
- the date and time of the hearing;
- the name of the case about which the witness will be testifying;
- the court name and the cause number of the case; and
- the name, address, and telephone number of the attorney who issued the subpoena.

In addition to your personal attendance to testify at a trial, the subpoena may be "duces tecum," which requires you to bring your records.

Institutions such as DCS, organizations which provide services on a DCS case, schools, and hospitals likely have an attorney who represent them. If you work for any of these, you may be able to consult with and utilize your institution's attorney. Speak as soon as possible with your supervisor, agency director, or principal about the subpoena and, if approved to do so, contact your agency's attorney on issues about your subpoena, including being unable to attend on the scheduled date and confidentiality of records. Your agency's or school's attorney may contact the attorney who issued the subpoena and be able to arrange a different date or manner for your testimony, such as a deposition. The agency's or schools' attorney may be able to arrange for the submission of records with an attached business affidavit in place of your appearance at court. An attorney for

an agency or school could also file a motion to "quash" a subpoena. "Quashing" a subpoena means voiding, ending, or otherwise suppressing the request in the subpoena.

If you do not have access to an attorney, you or your agency director may contact the attorney who issued the subpoena, explain your involvement with the case and your issues with what the subpoena requires, and work out a solution. If you receive a subpoena, it is best to plan to appear and testify at the court hearing.

E. What Do I Do With My Records?

If the subpoena includes "duces tecum" you should plan to bring a copy of your records. In CHINS, Termination of the Parent-Child Relationship, or family law cases, your records may have previously been provided to one or both parties. If you are concerned about confidentiality or privilege, it is best to bring a copy of the records to court and voice your objections about releasing them to the judge. At times, the parties may have agreed to release the records without your knowledge or they may do so at court on the record at the hearing. Since parents' physical and mental health are often at issue in family law cases, parents' records that might otherwise be privileged are often admitted by court order under seal or placed in the court's confidential file. Occasionally, the judge will review records "in camera" and then make decisions about which specific records will be released to the attorneys or self-represented parties. Reviewing records "in camera" means that a judge will review records in private, off the record, before making a determination as to what access to the documents other attorneys or parties should have, if at all.

F. How Do I Prepare To Testify?

The first thing to do is collect and read your reports, notes, and formal records. Secondly, your agency's or school's attorney could find out from the attorney who issued the subpoena what questions he or she plans to ask you. If you do not have an agency attorney, you may make this inquiry on your own. It is perfectly legal for an attorney to speak to and even send to a witnesses the questions which the attorney plans to ask a witness. Doing so is proper trial preparation. If remembering dates is difficult for you,

you should make a timeline with dates when you have had contact with a party to the case. Take the timeline with you to court. With the judge's permission, you may use it to "refresh your recollection" when testifying. This is permitted by Indiana Evidence Rule 612. This Rule also states that if you use a document to refresh your memory, then an adverse party is entitled to look at your document, ask you questions about it, and potentially introduce it as evidence. If you have voluminous records made at the times specific events occurred, and cannot remember events accurately, you may ask the judge if you may have the opportunity to refer to your records, which may qualify as "past recollection recorded." It is also possible that an attorney may ask to have records of this nature admitted as a "Recorded Recollection." A "Recorded Recollection" is explained in Indiana Evidence Rule 803(5) as something the witness once knew but now cannot recall well enough to give accurate testimony, was made by the witness when the matter was fresh in the witness's memory, and accurately reflects the witness's knowledge.

It is acceptable to tell the judge in court that you cannot recall a specific date or event but ask for permission to refer to your records.

G. What Is A Deposition?

Witnesses may be asked to give a deposition before the trial. An attorney for a party to the case may request the deposition. For a deposition, the witness appears at a pre-arranged time, usually at a court reporter's office or an attorney's office. The witness takes an oath given by a court reporter to tell the truth, just as if the witness were before the judge in court. Attorneys for the legal parties to the case and self-represented parties then ask questions of the witness. The court reporter records the attorneys' questions and the answers of the witness and later transcribes them into a typed document.

When the typed document is ready, the witness is given the opportunity to read the document, and correct misstatements in his testimony in writing, using an error sheet provided by the court reporter. A deposed witness does not need to give up the right to read and sign the typed document before swearing to its accuracy. A witness should not agree to "waive signing" of deposition, which is legal language for giving up the right to

read, correct using the error sheet, and sign a deposition. The witness then signs the document and the error sheet, swearing that the answers provided are true and accurate.

The deposition can be used to find out what a witness will testify about at trial or in place of a witness's testimony at trial if the witness is found by the court to be unavailable. The deposition can also be used by a party's attorney to challenge the witness's testimony at trial if the witness's testimony differs from what the witness said at the deposition. A witness should give complete, accurate answers to the questions asked in a deposition.

H. What Is A Continuance?

A continuance means that the case will not be tried on the scheduled date and time. A new trial may be scheduled for a later date. Often, continuances are granted close to or on the same day as the scheduled trial due to illnesses or other emergencies. A CHINS, Termination of the Parent-Child Relationship, or family law case could be continued because the parties have reached an agreement in place of trying the case. A criminal case could be continued because the prosecutor decides to dismiss the case or the defendant enters into a plea agreement.

An attorney who has issued a subpoena to a witness should contact the witness and cancel the subpoena as soon as the case is continued. However, you may wish to check for yourself. Since your subpoena will include the cause number and the name of the court where you are ordered to appear, before driving to court, you may call the court to ask the court staff whether the case will be heard as scheduled. If the court staff person clearly indicates that the case has been continued, call the attorney who issued the subpoena and ask him or her to release you from the subpoena. Court phone numbers may be found on the website for the county where the court is located.

I. How Do I Present Myself In Court?

The attorney who issued the subpoena or your agency's attorney should be able to give you directions and information on where to park. If not, the internet, GPS, the court and court staff, or a map will enable you to find the courthouse. In many Indiana counties, the

courthouse is located on the "square" in the middle of town, but this general information does not always apply. In Marion County, new construction has made finding public parking near the City-County Building extremely difficult. In Marion County, it may be easier to arrange for a friend to drop you off at court and pick you up after you testify. Downtown Indianapolis parking may be very expensive, so bring enough money, including cash, so that you can pay for parking at a parking lot. Because hearings often last longer than expected, parking at a parking meter may be risky.

Plan to arrive at court early. Ask questions and consult directories to be sure you are at the correct courtroom. There is often an information desk or security guards just inside the entrance to a courthouse, and they are sources of information and direction. Check in at the court office and show the court staff your subpoena. Dress in formal clothing you would wear to a religious service or a professional or business event. Cleanliness, neatness, and modesty are more important than fashion in the courtroom.

Bring your subpoena, your calendar (in the event the case is continued so you can request a convenient date), your curriculum vita, any medication or snack you might need for a medical condition such as diabetes, and your reports, notes, and records. Most courthouses have security, such as metal detectors. Leave items that won't pass through a metal detector, including metal nail files, scissors, or a pocket knife, at home. Turn your cell phone so it does not ring during the trial. Also make preparations in advance for others to care for your children, pets, and dependents, in case the trial lasts longer than anticipated.

If you have a time limit or prior commitment that cannot be avoided, and you must leave court at a certain time, make sure that the attorney who subpoenaed you is aware of this fact. You may also tell the court staff.

You may wish to check in with the court staff. Tell them you were subpoenaed, and they will give you direction as to which courtroom you will be in, and where to wait. Often, the attorney who subpoenaed you will seek you out to confirm you have appeared. If you

wish to talk to the attorneys, you may do so, unless your legal counsel, if any, says otherwise.

J. What Is Separation of Witnesses?

The judge must order separation of witnesses if an attorney or self-represented party requests it. Separation of witnesses means that witnesses may not speak to each other about their testimony either before or after they testify. The reason for separation of witnesses is to prevent witnesses from adjusting their testimony based on what the other witnesses tell them about the testimony they gave or expect to give. Usually witnesses wait together in a room separate from the courtroom. Acceptable communications with other witnesses could be speaking about current news or sports events. Unacceptable communications include any information about the parties or case or testimony which you expect to give or have given. If a separation order is violated, the judge may deny the witness the opportunity to testify.

K. What Is An Oath?

An oath is a promise the witness makes to tell the truth. The judge usually swears in all of the witnesses together at the beginning of the trial or the witnesses may be sworn in individually immediately before they testify. Indiana Code 34-45-1-2 states that before testifying, every witness shall be sworn to testify to the truth, the whole truth, and nothing but the truth. Quakers and others whose religions reject swearing an oath may affirm instead. It is vital to be absolutely honest, to the best of your ability, when testifying. Do not guess when testifying. It is acceptable to testify that you do not know the answer to the question, do not understand the question, do not have an opinion, or do not recall an incident or date.

L. What Is Direct Examination?

After the witness is seated at the witness stand, the attorney who issued the subpoena to the witness to testify will question the witness first. This is called "direct examination." The purpose of direct testimony is to present facts and/or opinions (if a witness is

qualified as a skilled ore expert witness), which support the position of a party to the case. Cases are proven through direct testimony.

Witnesses should carefully listen to each question, answer only what was asked, and make every effort to answer truthfully and accurately. In direct testimony, you will sit in the witness stand, look at the person who is asking questions, and answer the question. The judge may also ask questions. If you misspeak about a date or event, correct your mistake as soon as possible. Remember that as a witness, you may only answer when a question has been asked. You may not make a formal statement unless you are a self-represented party. It is acceptable to not know an answer. It is acceptable to not be able to recall, and to ask permission to look at your report or records to refresh your recollection. If the attorney asking questions or the judge agrees that you may refresh your recollection, take your time in looking at your report or records so your answer will be accurate. If you don't understand the question, do not answer it, and instead, ask for clarification. Do not volunteer information. Attorneys frequently ask hypothetical or speculative questions, and phrase it as "Isn't it possible that…?" Remember that almost anything is possible. Do not speculate or guess. Sometimes you will not understand the point of the question, but answer it as truthfully as you can. If you do not know, or do not have an opinion, say so.

Sometimes one of the other attorneys or a self-represented party may object to a question that was asked. Do not answer the question until the judge rules on whether the question is legally proper for you to answer. If the judge sustains the objection, you need not answer. If the judge overrules the objection, you may answer the question and the judge will usually direct you to answer the question. Sometimes there will be extensive argument among the attorneys about whether a question is proper. By the time the judge rules, you may have forgotten the question, so ask to have the question repeated.

If you have brought records or written notes, an email, photographs, or a report, you may be asked to identify them. Take your time to look through the items before identifying them. If you can identify the items, they may be submitted as exhibits for the judge to

consider in making his or her decision. You may be asked further questions on direct or cross-examination about the contents of the exhibits. You may ask to look at the exhibits a second time before answering questions about them.

Any party may impeach (call into question) a witness's credibility with evidence suggesting that a witness is unreliable, dishonest, mistaken, biased, or has given prior inconsistent statements. The content of the prior statement must be shown to the witness and the witness must be given the opportunity to admit, deny, or explain the inconsistency. The attorney may not insinuate the existence of unproved facts nor imply a connection the attorney cannot prove.

M. What Is Cross Examination?

Cross-examination provides the opportunity for the other attorneys or self-represented parties to ask questions about your direct testimony. The purpose of cross-examination may be to clarify your testimony, limit the effect of your testimony, or to show your testimony was not truthful, biased, mistaken, not fully informed, or otherwise not credible. In cases with multiple parties and attorneys, such as Termination of the Parent-Child Relationship cases, each attorney or self-represented party has the right to cross-examine each witness. Sometimes a cross-examining attorney will try to require a witness to answer questions only with "yes" or "no" answers. If you truthfully cannot answer the question "yes" or "no", you should respectfully say so and the judge will then give you direction about answering.

Do not be defensive or anxious on cross-examination. Do not give evasive answers or make your own objections to cross-examination questions. Do qualify an answer unless you must do so. Do not question or reply sarcastically to the cross-examiners. Remember that all of your testimony is on the record, and may be part of an appellate record. Push your emotions aside during all testimony, especially cross-examination.

N. What Are Re-Direct Examinations And Re-Cross Examinations?

The purpose of re-direct examination is for the attorney who called you as a witness to ask questions to clarify issues brought up by the other attorneys or self-represented parties on cross-examination. Although new topics should not be brought up on re-direct examination, sometimes the judge will grant the attorney permission to ask an omitted question. Re-direct examination may not take place because the attorney who called you as a witness may decide that re-direct questioning will not be helpful to the case. If re-direct examination questions are asked by the attorney, the other attorneys and self-represented parties may ask re-cross examination questions only about your testimony on re-direct examination. If there is no re-direct examination, there will be no re-cross examination. Sometimes the judge's directions or time constraints will curtail re-direct and re-cross examination.

O. What Happens After I Testify?

After you testify, the attorney who issued a subpoena for you to appear should ask for you to be excused. You could also ask the judge to be excused. The attorneys and self-represented parties will likely be asked by the judge whether they object to your being excused. Sometimes an attorney or party will want you to remain at court so you can be recalled as a witness, but this is rare. If you have urgent work or personal needs and must to be excused, tell the judge about your situation and explain why you should be excused. If the judge has ordered separation of witnesses, you should not speak to the other witnesses about your testimony after the court hearing.

If you appear to testify at court, Indiana Code 33-37-10-3 states that you are entitled to 40 cents per mile for each mile traveled to and from the court and $5.00 for each day of attendance in court. Indiana Code 33-37-10-3.5, effective July 1, 2014, states that a witness in any civil or criminal action who is employed by an Indiana school is entitled to 40 cents per mile for each mile traveled to and from court and $100 per day for each day of court attendance if the witness is called to testify on a regular school day for the witness's school district.